

GEPHARDT

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Lawrence M. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W., 6th Floor
Washington, D.C. 20463

November 5, 2003

AOR 2003-35

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2003 NOV -5 P 5:13

Re: Request for Advisory Opinion

Dear Mr. Norton:

On behalf of Gephardt for President, Inc. ("the Committee"), as its campaign manager, I write to request an advisory opinion from the Federal Election Commission under 2 U.S.C. § 437f. The Committee is Congressman Richard A. Gephardt's principal campaign committee as he seeks the 2004 nomination of the Democratic Party for the office of President of the United States.

Congressman Gephardt filed his Statement of Candidacy with the Commission on January 6, 2003. The Committee filed its Statement of Organization on January 7. The Committee has always intended to seek and accept public funds. Throughout the current election cycle, it has told prospective individual donors that their contributions would be matched, in whole or in part, with public funds. It continues to make this same representation, and will do so in the future.

On November 4, the Committee filed its threshold submission with the Commission to receive federal matching funds. (See Attachment.) Among other things, it submitted a letter signed by Congressman Gephardt in which he agreed to comply with a series of conditions. These conditions include:

- complying with the spending limits that apply to candidates receiving public funds.
- making Congressman Gephardt personally responsible, along with the Committee, for any civil penalties that might result from a Committee violation of the Act.
- permitting an audit of the Committee after the election.

PAID FOR BY GEPHARDT FOR PRESIDENT, INC.

- providing the Committee with documents relating to fundraising and spending on the candidate's behalf by other committees and organizations associated with him.
- keeping documents to demonstrate that each Committee disbursement is a qualified campaign expense.
- making the documentation for disbursements and matching fund submissions available to the FEC on request.
- using closed-captioning for each Committee television advertisement.

See 11 C.F.R. § 9033.1(b) (2003).

When the Committee filed its threshold submission, the Commission had certified only one major Democratic candidate as eligible to receive public funds.¹ That candidate was Howard Dean, who, in a letter to the Commission dated June 7, made the same representations and accepted the same conditions that Congressman Gephardt did.

On July 7, the Commission certified his eligibility for public funds. However, on November 4, after the Committee filed its threshold submission on Congressman Gephardt's behalf, Governor Dean publicly announced that he was reconsidering his earlier decision to accept public funds and to abide by the conditions he had publicly accepted. See, e.g., Mark Z. Barabak, *Dean Taking Poll on Funding Question*, L.A. Times, Nov. 5, 2003.

Governor Dean publicly claimed that his final decision would depend on the outcome of a poll of his supporters. However, in closed-door sessions, he had "told potential supporters he had already decided to forgo public financing", according to the *Los Angeles Times*. *Id.* One Dean campaign official told the *New York Times* that the poll was "a way to provide political cover for abandoning the system." Jodi Wilgoren, *Dean Considers Plan to Forego Public Financing*, N.Y. Times, Nov. 5, 2003.

Congressman Gephardt is a longtime supporter of the public financing system, and has so far in this cycle's presidential campaign publicly committed to participation and solicited contributions on that basis. However, Governor Dean's decision to drop out of the system requires reconsideration of this choice and its

¹ On October 8, the Commission also certified Lyndon LaRouche, who professes to seek the Democratic nomination, as eligible for public funds.

consequences. The Committee can foresee a situation where Governor Dean's decision leads other Democratic candidates to abandon the public financing system – either by never applying for public funds at all, or by applying for public funding and dropping out of the system later like Governor Dean.

This, in turn, could place Congressman Gephardt at an immense disadvantage, particularly in early primary states where the spending limits binding on publicly funded candidates can significantly effect the outcome. While other major candidates in the race could spend unlimited amounts in Iowa and New Hampshire, Congressman Gephardt would have to operate under tight expenditure limits and absorb the related costs of compliance. While the Commission has not yet published the spending caps for the 2004 primaries and caucuses, the Committee's own calculations indicate that the limits in Iowa and New Hampshire will be approximately \$1.3 million and \$730,000, respectively.

These circumstances force the Committee to determine whether it may still refuse public funds and spend beyond the limits, even after filing its 9033 letter. With the Committee's application for public funding now pending, the Committee seeks advice from the Commission as to whether its decision to comply with the conditions for public financing is revocable. The Committee further seeks advice as to what specific consequence would flow from revoking its decision, should it be lawful to do so.

To the Committee's knowledge, no one in the history of the matching fund system has ever agreed to the conditions for accepting public funds, only to reverse that decision for strategic advantage. As the Commission's General wrote in 1999, "[t]he Matching Payment Act does not contemplate or directly address a situation in which an eligible candidate declines payments to which she is entitled." Memorandum from Lawrence M. Noble, General Counsel, to the Commission (Dec. 20, 1999) (regarding Elizabeth Dole for President Exploratory Committee).² Even President George W. Bush did not take the step that Governor Dean is now taking. Rather than seek public funds initially and then reverse his decision like Governor Dean, President Bush in 2000 simply never applied for primary matching funds at all.

The lack of clear, formal Commission guidance raises a number of questions that the Committee feels would have to be resolved before it could lawfully reconsider a decision to seek public funds:

² In the case of Elizabeth Dole, the Commission addressed a situation quite different from this one. She withdrew her request for public funds after she had dropped out of the race, so that she could avoid a Commission audit. See Letter from Lawrence M. Noble at 1-2.

Contributor Intent: Notification, Authorization and Refunds

First, the Committee asks whether it would have to refund contributions to donors who gave while understanding that their contributions would be matched with public funds. The Commission has consistently tried to clarify and protect the understanding of donors who give to political committees. For example, its regulations require candidates to refund contributions made for a general election in which they ultimately do not run. See 11 C.F.R. § 102.9(e)(3).

Similarly, Commission rules allow party committees and PACs to deposit checks into their federal account only when the donors have been told that their funds are being spent to influence federal elections. See 11 C.F.R. § 102.5(a)(2). "The purpose of this regulation is to assure that funds placed in this account *are from contributors who know the intended use of their contributions ...*" Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,073 (2002). See also MUR 4961 and Advisory Opinion 2001-17 (limiting, by way of protecting donor intent, a party committee's ability to "split" a check between its federal and nonfederal accounts.).

Finally, even while making it easier for committees to redesignate a contribution to a different election or reattribute it to a joint accountholder, the Commission still required committees to tell donors and provide them an opportunity to object. See Contribution Limitations and Prohibitions, 67 Fed. Reg. 69,928, 69,930-31 (2002). The Commission stressed "the need to honor contributor intent, noting that some primary election contributors might plan to support a different candidate in the general election." *Id.* at 69,931. Contributor intent is also protected through the "joint fundraising" disclaimers required by 11 C.F.R. § 102.17(c)(2).

The Committee fears that if it raised funds from donors on the understanding that their contributions would be matched, it would violate the donors' original intent if it reversed its decision to take public funds. The contributors might not have given at all, had they known that their funds would not be matched. Some donors may only be prepared to support a candidate committed to the public financing system.

Accordingly, the Committee asks:

(a) whether it would have to refund contributions solicited under such an understanding, and if so, on what timetable. See, e.g., Advisory Opinion 1992-15 (allowing contributors to redesignate general election contributions to a future campaign within 60 days after the candidate lost the primary);

(b) whether it may keep the contributions upon obtaining the authorization of the donor. The Committee asks further whether such authorization, if allowed, must be made by a signed writing, or may be provided orally and memorialized in a memo to file.

Continued Significance of the Commitments Made in the Candidate Certification and Agreements

Second, the Committee asks to what extent it would remain bound to the conditions accepted by Congressman Gephardt when he submitted his Candidate and Committee Certifications and Agreements under 11 C.F.R. § 9033.1.

Some of the conditions seem contingent on the actual, future receipt of public funds. See, e.g., 11 C.F.R. § 9038.1(a)(1) (requiring audits of each candidate "who received Presidential primary matching funds"). See *also* 11 C.F.R. § 9035.1(d) (providing that the expenditure limits "shall not apply to a candidate who does not receive matching funds at any time during the matching payment period").


Nonetheless, the Committee requires guidance on when it would be considered to have "received" public funds for purposes of the spending limits and audit requirements. For example, certification to receive public funds is an asset against which a bank may loan funds on a basis assuring repayment, see 11 C.F.R. § 100.82(e)(2). The Committee thus asks whether it will "receive" public funds when the Commission certifies Congressman Gephardt's entitlement to the Secretary of the Treasury under 26 C.F.R. § 702.9037-2(a), even if the actual funds have yet to be paid. The Committee also asks whether it may defer a scheduled payment from the Treasury and preserve its option to leave the system.

Finally, the Committee notes that there are a number of conditions under 11 C.F.R. § 9033.1(b) that do not expressly depend on the actual receipt of public funds. These include the candidate's acceptance of personal responsibility for civil penalties imposed for Committee conduct, see 11 C.F.R. § 9033.1(b)(11); the documentation requirements imposed on the Committee, see 11 C.F.R. § 9033.1(b)(2), (3), (4), (5), and (6); and the requirement that Committee ads be closed-captioned, see 11 C.F.R. § 9033.1(b)(12).

The Committee asks whether it would continue to be bound by any of these requirements after a decision to drop out of the public financing system. It further asks whether civil penalties would result from any breach of these conditions that occurs between the time it applied for matching funds, and the time it notified the Commission of a decision to refuse public funds.

Because of the unusual circumstances, the Committee respectfully asks the Commission to consider this request on an expedited basis. The Committee notes that the Iowa caucuses are on January 19, and the New Hampshire primary will take place on January 27.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven G. Murphy". The signature is fluid and cursive, with the first name "Steven" written in a larger, more prominent script than the last name "Murphy".

Steven G. Murphy
Campaign Manager
Gephardt for President, Inc.